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No. 97-569

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES,

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Certiorari was granted on the following question, as framed by petitioner Burlington Industries, Inc.: Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other amici. Some recent cases include *Faragher v. City of Boca Raton*, No. 97-282 (1997); *Oncale v. Sundowner Offshore Services, Inc.*, No. 96-568, 66 U.S.L.W. 4172 (U.S. March 4, 1998); *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Systems, Inc.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination, including sexual harassment. Both before and since this Court's opinion in *Meritor Savings v. Vinson*, 477 U.S. 57 (1986), courts have struggled to determine when a plaintiff had alleged sufficient facts to set forth a proper claim of *quid pro quo* sexual harassment. NELA submits this brief to

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. With the exception of the fact that counsel for petitioner, Ernest Rossiello and Elena Dimopoulos, are members of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

address this important question of law, and, in so doing, to protect the interests of its members' clients, by helping to ensure that Title VII's goal of eradicating employment discrimination is fully realized.

SUMMARY OF ARGUMENT

NELA urges this Court to dismiss the writ of certiorari as improvidently granted. *Amicus* submits that the question presented by petitioner is completely at odds with the factual record before the Court.

Should this Court determine that it will not dismiss Petitioner's Writ of Certiorari, *Amicus* urges this Court to hold that "tangible effects" need not be shown by a victim of *quid pro quo* discrimination prior to recovering against the employee for a supervisor's sexual harassment.

Amicus further urges this Court to hold that a plaintiff employee need not submit to the sexual demands of her supervisor in order to have a cause of action under Title VII. A serious *quid pro quo* threat is sufficient to trigger liability even if that threat remains unfulfilled.

PROCEDURAL STATUS OF THE CASE

Respondent Kimberly B. Ellerth [Ellerth] filed a civil action in the United States District Court for the Northern District of Illinois, asserting that petitioner Burlington Industries Inc., [Burlington] had discriminated against her and constructively discharged her in violation of Title VII by subjecting her to sexual harassment. The district court granted summary judgment for petitioner Burlington. Thus, all of Ellerth's allegations which are supported by substantial evidence, and are thus sufficient to justify a verdict in her favor, must be taken as true for the purpose of deciding the legal issues before this Court. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[2]

The United States Court of Appeals for the Seventh Circuit concluded that Ellerth had waived any claim of negligence, and thus declined to rule on any theory of hostile work environment harassment; it ruled only on the claim of "*quid pro quo*" harassment. A three-judge panel, and then the full court, en banc, reversed the district court, holding that Ellerth's allegations were sufficient to justify a finding of *quid pro quo* harassment. *Jansen v. Packaging Corporation of America*, 123 F.3d 490 (7th Cir. 1997) (hereinafter *Jansen/Ellerth*) This Court granted a petition for a writ of certiorari.

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[2] NELA wishes to call to the Court's attention that, in the experience of our members, this rule is being frequently disregarded or misapplied by the district courts, who are weighing facts, making credibility determinations, and disregarding sworn affidavits and deposition testimony from plaintiffs in order to enter summary judgment for employers in sexual harassment and other discrimination cases. NELA respectfully asks this Court to use the instant case to remind the district courts that motions for summary judgment may not properly be granted unless there is no substantial evidence supporting a necessary element of the plaintiff's case, and that the existence of any disputed material fact requires that such motions be denied.

STATEMENT OF MATERIAL FACTS

Ellerth worked for Burlington in its Chicago offices from March of 1993 until May of 1994, first as a merchandising assistant (JA 118, 120),[3] and later as a sales representative (JA 121). Throughout her employment, her direct supervisor was Theodore Slowik [Slowik], a Vice President based in Burlington, New York (JA 119-121). Slowik had the ultimate decision-making authority over Ellerth's hire (JA 118-119) and her subsequent promotion (JA 121-122). After her promotion in the spring of 1994, she was required to obtain Slowik's approval before working on special projects requested by her customers (JA 144, 160).

Soon after Ellerth began working for Burlington, Slowik began a series of acts which Ellerth understood to be sexual solicitations, coupled with threats of retaliation if she refused to submit to his solicitations (JA 156). For example, in the summer of 1993, while on a business trip to North Carolina, Slowik first made a series of sexual comments about a number of women's breasts and legs, then commented on Ellerth's breasts. He also told her to "loosen up," and explained "you know Kim, I could make your life very hard or very easy at Burlington." (JA 135, 155-156). On another occasion, she understood him to demand that she perform an act of fellatio, stating "on your knees again Kim" (JA 138).

Ellerth did not submit to Slowik's solicitations. Thereafter, he subjected her to unwanted touching of her body, including her knees and buttocks (JA 132, 140, 141); numerous unwanted and offensive sexual jokes, comments and innuendos (JA 130-131, 132, 136, 137, 142, 143, 137, 153, 154, 155, 156,

[3] The designation "JA" refers to the Joint Appendix filed by the parties.

157, 158, 159, 160) including jokes suggesting that because she has blonde hair she is sexually promiscuous (JA 137, 143); unwanted statements to her and to others in her presence about her body, in particular her breasts, legs and buttocks (JA 139, 141, 142, 154, 155, 157, 158, 160); unwanted suggestions to other employees (including another Burlington vice-president) that they comment on her body (JA 133); and, in her presence and directed to her attention, unwanted sexually offensive comments about other women's bodies (JA 155). Respondent's opposition to summary judgment includes a list of over one hundred incidents that support her claim (JA 162-175).

In early 1994, Ellerth applied for a promotion from merchandising assistant to sales representative (JA 158-159). Slowik hesitated before promoting her, complaining to several Burlington employees that she was "arrogant" (JA 158-159). When she confronted him with obstructing her promotion, he rubbed her knee and explained that, in his view, she was "not loose enough" for the promotion (JA 141-142, 159).

After some delay, Ellerth was eventually promoted. In her new position, she needed Slowik's approval for certain projects (JA 144). In late April or early May of 1994, Ellerth telephoned Slowik to secure his permission to undertake a special project involving putting a customer's logo in a fabric (JA 144, 160). He refused to authorize the project unless she described to him what she was wearing (JA 144, 160). In a second phone conversation, again seeking permission for the special project, Slowik again refused to authorize the project, and asked "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." (JA 160). Ellerth regarded this as "the straw that broke the camel's back" (Deposition of Steven Ellerth at 90, Exhibit "F"

of Plaintiff's Appendix to Answer to Motion for Summary Judgment).

Soon thereafter, she resigned. In her resignation letter, she explained that she was resigning because of Slowik's harassment. Before submitting the letter, she redacted the portion regarding the harassment. (JA 101) However, three weeks after her resignation, Ellerth did inform Slowik's supervisors at Burlington that she had resigned because of Slowik's harassment, which she found "unbearable" (JA 15-16). Ellerth had complained about Slowik's harassment to Slowik himself (JA 149), to customer service manager Donna Thibideau (JA 148) and to five co-employees (JA 148, 133). Her harassment had been observed by Burlington vice-president Angelo Brenna (JA 133). She did not complain to Slowik's supervisors prior to her resignation because (1) she believed she would suffer retaliation if she did (JA 145-146), (2) she did not know whether Burlington's anti-harassment policy was in effect (JA 144-145), and (3) she did not know whom to complain to under the policy (JA 144-145).

ARGUMENT

I.

CERTIORARI WAS IMPROVIDENTLY GRANTED.

This Court granted certiorari based on a question presented by the petitioner that is completely at odds with the factual record established below. The question of whether a claim of *quid pro quo* sexual harassment may be stated under Title VII, where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser, nor suffered any tangible effects as a consequence of a refusal to submit to those advances, is not properly presented by this case's factual record. This case's record instead fully supports allegations that in retaliation for plaintiff's refusal to submit to her supervisor's sexual advances: (1) her work-related requests were denied, (2) she was constructively discharged, (3) her promotion was delayed, and (4) she was subjected to an abusive work environment. Given the factual record now before the Court, the writ of certiorari should be dismissed as improvidently granted.

II.

QUID PRO QUO SEXUAL HARASSMENT INCLUDES THREATS BY SUPERVISORS NOT CARRIED OUT AS WELL AS THREATS FULFILLED.

If this Court determines that Petitioner's Writ of Certiorari should not be dismissed, this Court must determine the liability of the employer in situations where the victim of *quid pro quo* harassment does not submit to the sexual advances of the harasser, and must also determine what, if any, "tangible effects" the victim must show prior to recovering against the employer for *quid pro quo* harassment. As further addressed in Sec. III below, the term "tangible effects" has its roots in cases decided prior to the Civil Rights Act of 1991. Prior to the 1991 Act, plaintiffs were required to show "tangible effects" of the discrimination in order to receive injunctive relief, the only relief other than back pay available at that time. The Civil Rights Act of 1991 was enacted in part to allow victims of discrimination to receive compensatory and other legal damages. *Amicus* submits to this Court that a finding of "tangible effects" is no longer required, and that if any question remains before this Court in this case, it is only the question of whether a plaintiff employee has a cause of action under Title VII for sexual harassment, when she has not submitted to the sexual advances of the alleged harasser.

Title VII of the 1964 Civil Rights Act prohibits "discriminat[ion] . . . because of . . . sex," including sexual harassment directed at an employee because of her sex. *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this Court relied upon the position taken by the Equal Employment Opportunity Commission (EEOC) that there are two types of sexual harassment prohibited by Title VII. *Meritor* at 477 U.S. 62, 64-65; *Harris* at 114 S. Ct. 370. The first, "abusive work environment" or "hostile work environment" sexual harassment, was the subject of the Meritor and Harris cases. The second, termed "*quid pro quo*" sexual harassment, has not yet been defined by this Court. However, many of the Circuit Courts have defined "*quid pro quo*" sexual harassment to include threats of harassment (See, *Jansen/Ellerth* at 490; *Karibian v. Columbia University*, 14 F.3d 773 (2nd Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

In the instant case, the record is clear that Ellerth did not submit to the sexual demands of her supervisor, but that she was nonetheless subjected to further threats as well as actual retaliation for her refusal to submit. Although some of those threats were never acted upon, Ellerth only learned that they were not acted upon by living through the threats and waiting to see what would happen next. Only once she was constructively terminated through her resignation could Ellerth know that there would be no further threats or the risk of career detriment at Slowik's hands.

Given the degree of authority that workplace supervisors have in our society, *amicus* submits that *quid pro quo* harassment must be deemed to have occurred when the

supervisor makes a threat, whether or not that threat is actually carried out, and that the employer must be liable for that supervisor's conduct.[4] For the employee subjected to those threats there is no difference between the two as the threats are occurring; only in hindsight can one know the difference. As Judge Flaum noted in *Jansen/Ellerth*, "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled . . . [N]ow that emotional damage is compensable, the scope of *quid pro quo* should encompass clear unfulfilled threats that cause serious emotional harm." 123 F.3d at 499.

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[4] *Amicus* limits this issue to one of the employer's liability because every Circuit, except the First, has held that there is no individual liability under Title VII, leaving the victim of discrimination without a remedy if the employer is not held responsible. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2nd Cir. 1995); *Sheridan v. E.I. DuPont Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996); *Dici v. Com. of Pa.*, 91 F.3d 542, 552 (3rd Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), cert denied, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d (1994); *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Bonomolo-Hagen v. Clay Central-Everly Community School Dist.*, 1997 WL 467573 (8th Cir. 1997); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994); *Haynes v. Williams*, 88 F.3d 898, 900 (10th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert denied*, ___ U.S. ___,116 S.Ct. 569, 133 L.Ed.2d 493 (1995). The First Circuit has declined to answer the question, describing the issue of individual liability under Title VII as "potentially difficult." *Margarita Serapion v. Fred H. Martinez*, 1997 WL 394605 (1st Cir. 1997). Language in other cases from the First Circuit suggest that it too will follow the other circuits in holding there is no individual liability. See, e.g., *Morrison v. Mills*, 108 F.3d 429 (1st Cir. 1997).

The EEOC in 1980 and again in 1990 issued directives which considered unfulfilled threats to be within the scope of Title VII. Both these directives were drafted prior to the Civil Rights Act of 1991; hence they still referred to Title VII in terms of injunctive relief only. However, in its 1980 Guidelines on the Law of Sexual Harassment, the EEOC defined *quid pro quo* sexual harassment as occurring "when (1) submission to such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." EEOC Guidelines, 29 C.F.R. §1604.11(a)(1)(1980). These Guidelines have been recognized by this Court as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65, quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1971).

In 1990 the EEOC issued its "Policy Guidance on Sexual Harassment" interpreting this Court's decision in Meritor and its effect on the 1980 Guidelines. EEOC: Policy Guidance on Sexual Harassment (3/19/1990) in Gamble, Sex Discrimination Handbook (BNA 1992) at 328, 329 (hereinafter "Policy Guidance"). Although the Guidance was also enacted prior to the Civil Rights Act of 1991, and therefore assumes that injunctive relief is the only relief available to victims of sex discrimination, the Guidance is informative as it sheds some light on the EEOC's interpretation of the elements of a *quid pro quo* claim. The EEOC explained that harassment that begins as hostile work environment harassment may be transformed into *quid pro quo* harassment. "For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge. Similarly, a supervisor who

makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply . . . [or] if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." The EEOC further describes *quid pro quo* cases as those in which a supervisor "has made or threatened to make a decision affecting the victim's employment status." *Id.* at 341.

Although this Court has not yet provided its own definition of the meaning of *quid pro quo* sexual harassment, an application of the ordinary meaning of the term will demonstrate that Ellerth has set forth sufficient substantial evidence in support of factual allegations to defeat Burlington's motion for summary judgment. Black's Law Dictionary defines "*quid pro quo*" as "what for what; something for something. Used in law for the giving of one valuable thing for another . . ." Black's Law Dictionary (6th Ed.) 1248 (West 1990). Substantial evidence supports Ellerth's claim that Slowik explicitly offered such an exchange on at least three occasions, and implicitly left the offer open throughout her employment by Burlington. A jury could reasonably conclude that when Slowik demonstrated his interest in a sexual relationship with Ellerth through his comments and sexual touching in North Carolina, and then told her he could make things at Burlington "very hard or very easy" for her, he was proposing an exchange of one valuable thing for another—an exchange of sex for easy working conditions. Similarly, a jury could reasonably conclude that when Slowik informed Ellerth she was not "loose" enough for a promotion, he was again proposing such a *quid pro quo* exchange. And, a jury could reasonably conclude that when Slowik refused to approve a project unless Ellerth described what she was

wearing and agreed to wear shorter skirts, he was yet again proposing a *quid pro quo* exchange.

III.

TITLE VII LIABILITY FOR *QUID PRO QUO* HARASSMENT IS NOT LIMITED TO CASES IN WHICH THERE ARE ECONOMIC EFFECTS.

Petitioner also argues the proposition that in the absence of economic effects, there can be no Title VII liability for *quid pro quo* harassment. This argument seems considerably hypothetical given the facts of this case, where the plaintiff alleges that she was denied a promotion for a period of time, and then constructively discharged because she resisted a vice-president's sexual advances. But even if the facts supported Petitioner's theory, Petitioner's arguments should be rejected.

A. The 1991 Civil Rights Act Provides A Remedy For *Quid Pro Quo* Sexual Harassment Even In The Absence Of Economic Damages.

Petitioner relies on cases and commentary concerned with the limitations of Title VII actions prior to the Civil Rights Act of 1991, which transformed Title VII from an act providing for equitable relief to one providing both equitable relief and legal damages. Title VII was amended in 1991 to provide for compensatory and punitive damages because Congress had determined that such damages were "necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity." 42 U.S.C. § 1981a; H.R. Rep. No. 102-40, p. 64 (Apr. 24, 1991).

The House Report on the Civil Rights Act of 1991 recounted the stories of many women who endured years of sexual harassment in the workplace, but were only awarded nominal amounts for their actual economic damages. *Id.* at 66-67. Congress believed that Title VII should compensate victims of sexual harassment for the "terrible humiliation, pain and suffering, and psychological harm" that they experience, whether or not they suffered any economic harm. *Id.* at 66. Nowhere in the legislative history of the 1991 Act did Congress suggest that its intent was to provide such damages only to victims of hostile environment harassment.

As described in more detail below, unfulfilled threats of *quid pro quo* harassment can by themselves cause women considerable emotional distress. In order to recover for damages for this harm under Title VII, as amended by the Civil Rights Act of 1991, sexual harassment plaintiffs need not prove any economic detriment. To impose a requirement of tangible "economic" harm on *quid pro quo* sexual harassment plaintiffs would be to impose a requirement that Congress rejected.

B. Congressional Intent And Public Policy Support *Amicus'* Position That Unfulfilled Threats Violate Title VII Even When There Are No Economic Effects.

If this case were one in which the only acts of harassment were threats, and the threats were neither submitted to nor carried out, petitioner would still be liable for *quid pro quo* sexual harassment. This position is buttressed by the 1990 EEOC Policy Guidance, which describes *quid pro quo* sexual harassment as occurring where the supervisor "has made or threatened to make a decision affecting the victim's employment status." Policy Guidance at 341. The EEOC policy is fully justified by the fact that even the threat that an

employee's job status will be harmed if she does not submit is a serious wrongful act, and a serious abuse of the supervisor's authority to discipline and fire employees. Because it goes to the ability of the employee to make a living, the very heart of the employment relationship, it must be subject to the most diligent protection. It must be distinguished from the standard case of hostile work environment sexual harassment, where the employee's working conditions are affected, but her employment status and earning capacity is not necessarily threatened. If discharge is the "capital punishment" of the workplace, then the threat of discriminatory discharge must be treated as potentially more serious than subjecting employees to discriminatory working conditions.

By focusing on threats made and coercive exchanges attempted, as well as threats carried out, *quid pro quo* sexual harassment is analogous to the tort of assault. An assault occurs either when an attempted battery fails, or when a battery is threatened. Restatement (Second) of Torts, Section 21 (1965). The wrong is in causing the victim to experience apprehension of a battery, even if no battery actually occurs. Here too, even if the threat is never carried out, or an attempt to carry it out fails, the threat alone causes actual harm to its target. She is left continually unsure whether the threat will soon be carried out, whether she will suffer a termination, demotion, or other adverse employment decision, and whether the threat will be renewed, bringing further anxiety and insecurity. Even absent the carrying out of the threat, she has suffered significant compensable harm from discrimination because of sex.

Moreover, from the point of view of the employee, once the threat is made, it is as good as carried out. Many women are afraid to speak out against their supervisor. The supervisor typically has more tenure with the company, more "well placed" friends within the company and often is in a position

that is more secure than that of the victim. Unless she elects the draconian choice of complying with the improper sexual demands, she lives in fear, waiting for the other shoe to drop. If the harasser fires her, she will lose her livelihood. If he prefers to simply let her dangle in the wind, perhaps hoping that in time she will submit, she is never again secure in her employment—the harm has been done. Even if the threat is never exercised, under the Civil Rights Act of 1991 that harm is now compensable. As Judge Flaum found in *Jansen/Ellerth*,

> If the aim is to guard against sexual harassment, there is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training their supervisors. And while compensation of the victim may be secondary in overall importance to the goal of deterrence, it is undeniable that an employee can be harmed by an unfulfilled *quid pro quo*. A supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife. An employee who does not submit may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out. Further, holding employers responsible for threats that clearly condition tangible job benefits upon the receipt of sexual favors and result in injury, even if no adverse job consequences follow, is consistent with the fact that the employee who submits to such a threat is afforded a remedy.

Jansen/Ellerth, 123 F.3d 490 at 499-500.

Ellerth's allegations are similar to allegations ruled on by the First Circuit in a case under Title IX,[5] *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). Dr. Lipsett, a female surgical resident, was sexually solicited by two of her supervisors in the residency program. When she complained to their supervisor, he suggested that a sexual relationship with a supervisor would help her in her career. She never submitted to this implicit threat, but because she resisted their advances they "made [her] life unbearable." *Id.* at 888. Reversing an entry of summary judgment, the court ruled:

> The plaintiff also established a prima facie case of *quid pro quo* sexual harassment by Drs. Rivera and Morales. She claimed that each man implied that she should have sex with him, a demand made even more explicit by the warning issued by Dr. Oben, who told the plaintiff that it was 'characteristic' for a 'low level woman resident to keep a relationship with a high level resident or an attending in order to ease her way through [the program].' The plaintiff further alleged that once it became clear that she would not 'keep a relationship' with either Dr. Rivera or Dr. Morales, they both became unfriendly and even hostile. This series of allegations portrays the very essence of *quid pro quo* harassment.

Id. at 905-906.

Similarly, the Third Circuit makes the point that in those cases in which

> submission to such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment . . . a *quid pro quo*

[5] 20 U.S.C.A. § 1681 et seq.

> violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of her sex [EEOC Guidelines, 29 C.F.R. § 1604.11(a)(1) (1980)] . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred. Similarly, there is a violation under subsection (1) even if the employee rebuffs the advances and his or her compensation, terms, conditions, or privileges of employment are not in fact altered, i.e., even if the supervisor does not follow through on his or her threat. The threat is sufficient to constitute 'discriminat[ion] . . . with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex.'

Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296-97 (3rd Cir. 1997).

This Court need look no further than the decision of the District of Columbia Circuit in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) and Ellerth's companion case, *Jansen v. Packaging Corporation of America*, 895 F.Supp. 1053 (N.D. Ill. 1995), to appreciate the danger of accepting petitioner's argument that discriminatory threats, if not carried out, are immune from Title VII liability. As in this case, the supervisor in *Gary v. Long* began his harassment by telling Ms. Gary that he could make her job "easier" if she'd have sex with him. When she declined, he, like Slowik, made his subordinate's work life very difficult, threatening her with adverse employment decisions, including termination, bombarding her with sexual solicitations and crude sexual references to her body, and threatening to "get" her for rejecting his advances. Unlike this case, the supervisor ultimately raped Ms. Gary. Yet the D.C. Circuit incredibly found that

there was no *quid pro quo* liability because the supervisor, Mr. Long, did not carry out his threats. *Id.* at 1396. The court also rejected Ms. Gary's hostile environment claim against the employer, and her individual Title VII claim against her supervisor. *Id.* at 1397-99.

The separate district courts in both Ellerth and Jansen relied on the reasoning of *Gary v. Long* in dismissing those causes of action in summary judgment proceedings. In Jansen, plaintiff's supervisor withheld her review for several months. When Ms. Jansen asked him about the overdue review, her supervisor would state while patting his genitals that he "hadn't forgotten" about it. 895 F.Supp. at 1060. Relying on *Gary v. Long*, the district court rejected Ms. Jansen's *quid pro quo* claim because the threats were not carried out and Ms. Jansen "was not harmed in any tangible economic way." *Id.* The court also rejected Ms. Jansen's hostile environment claim. *Id.*

Johnson v. Runyon, 928 F.Supp. 575 (D.Md. 1996) also demonstrates how the petitioner's suggested standard fails to adequately protect employees from the coercive sexual conduct of their employers. In that case, the supervisor made numerous lewd, offensive, and suggestive comments to Ms. Johnson, and repeatedly made sexual advances. *Id.* at 586. He asked her if she was dating another employee, and told her that if she were not then she should be with him. He repeatedly suggested that she should have sex with him, even going to her home several times to make these suggestions. He often stood close to her and inappropriately touched her. After he had attempted to embrace her and she pushed him away, he began a campaign of harassment, including verbal abuse, a low performance rating, and a bad recommendation. *Id.* The court found that she had not stated a *quid pro quo* claim, because she could not show that her refusal had led to a tangible job detriment. *Id.* at 587.

Rushing v. United Airlines, 919 F.Supp. 1101 (N.D.Ill. 1996) is yet another example of the irrational consequences imposed by adopting the reasoning of *Gary v. Long*. In *Rushing*, the plaintiff was subjected to repeated requests for oral sex by a supervisor. *Id.* at 1105. After he refused, Mr. Rushing was assigned less desirable jobs at the worksite and singled out for discipline. *Id.* at 1109. The district court held that Mr. Rushing had not stated a *quid pro quo* claim because he "did not suffer any adverse employment consequences." *Id.* The court also rejected his hostile environment claim. *Id.* at 1108.

Acceptance of petitioner's argument and the holding of *Gary v. Long* would leave an enormous gap in the protections offered by Title VII against discrimination and harassment in the workplace and discourages victims of harassment from coming forward and complaining about their supervisor's harassment. It would encourage predatory supervisors to "rattle their sabers" and threaten their subordinates, safe in the knowledge that as long as they do not actually carry out the threats there will be no liability, unless their behavior is deemed severe or pervasive enough to also constitute an abusive or hostile work environment.

C. Scientific Evidence Demonstrates That Unfulfilled Threats Of Retaliation For Refusing Sexual Advances By Supervisors Cause Serious Harm.

A recent government-commissioned survey of 20,000 women in the armed forces demonstrates that when women are threatened with retaliation for refusing to have sex with their supervisors or co-employees, they suffer very substantial harm regardless of whether the threats are actually carried out. Fitzgerald, L.F., Bergman, M.E. and Hulin,

C.L. *The Harms of Asking: The Psychological and Job-Related Consequences of Sexual Coercion in the Workplace*. (March 26, 1998) <ftp://www.psych.uiuc.edu/pub/share/fitzger> (hereafter "Fitzgerald study"). This evidence demonstrates why it is critical to hold that the threat of *quid pro quo* harassment is itself sufficient to establish a violation of Title VII.

The Fitzgerald study examined two large sets of sexual harassment targets. The first grouping measured the impact of sexual harassment threats when the threats were not carried out, precisely the situation reflected by the question presented by petitioner in this case. This grouping compared three groups: (1) women who had not been sexually harassed, (2) women who had been threatened with negative consequences for not cooperating sexually with a superior or co-worker, but had not actually been subjected to the threatened consequences, and (3) women who had actually experienced the threatened consequences. The study found that those women who were "only" threatened experienced job-related harm, health-related harm, psychological harm, and lowered work productivity when compared with women who had not been sexually harassed. Moreover, it found that the primary harm comes from the threat itself, rather than carrying out the threat; there was no significant difference between those who had "only" been threatened with retaliation and those who had actually suffered retaliation. Job related effects from the threats include (but are not limited to): Lowered satisfaction with work; decreased commitment to the organization; and, interference with work because of emotional and health related problems related to the threats. Threatened women who were not retaliated against suffered severe substantial physical and emotional harm, indistinguishable from those who were retaliated against.

The second grouping of the Fitzgerald study examined women who were subjected to a broad panoply of sexual harassment, answering "yes" to the following descriptions of conduct: a) repeatedly told sexual stories or jokes that were offensive to you; b) made crude and offensive sexual remarks, either publicly (for example, in your workplace) or to you privately; c) made offensive remarks about your appearance, body, or sexual activities; d) made unwanted attempts to establish a sexual relationship with you despite your efforts to discourage it; e) stared, leered, or ogled you in a way that made you feel uncomfortable; g) made you feel like you were being bribed with some sort of reward or special treatment to engage in sexual behavior; h) made you feel threatened with some sort of retaliation for not being sexually cooperative; i) touched you in a way that made you feel uncomfortable; j) made unwanted attempts to stroke, fondle, or kiss you; k) implied faster promotions or better treatment if you were sexually cooperative; l) made you afraid you would be treated poorly if you didn't cooperate sexually. These facts are quite similar to the allegations made by Ellerth in the instant case. The Fitzgerald study found, predictably, that these women suffered job-related harm, health-related harm, psychological harm, and lowered work productivity. It further found that the harm they suffered was once again comparable to the harm experienced by women who were "only" threatened with retaliation for not submitting to sexual demands. Whether we accept Petitioner's or Respondent's factual premise, then, there is significant scientific evidence that women in Ellerth's position are likely to suffer substantial compensable harm from the kind of conduct alleged in this case.

IV.

UNDER THE EEOC'S 1980 DEFINITION OF *QUID PRO QUO* HARASSMENT, ELLERTH HAS PROPERLY SET FORTH THE NECESSARY FACTUAL ALLEGATIONS TO DEFEAT SUMMARY JUDGMENT.

A. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Submission To Sexual Harassment Was Made A Term Or Condition Of Her Employment.

As noted above, the EEOC's 1980 Guidelines define *quid pro quo* sexual harassment as occurring "when submission to such conduct by an individual is made either explicitly or *implicitly a term or condition of an individual's employment* . . . (emphasis added)." On the basis of the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding the following: (1) in conditioning Ellerth's promotion on her being less "arrogant" and more "loose" he conditioned her promotion on her engaging in sexual acts with him; (2) in refusing to approve her special project unless she engaged in sexual banter over the phone with him ["tell me what you're wearing"], or begin wearing short skirts to show him her legs, he conditioned her satisfactory performance of her work on her engaging in sexual activity with him; (3) in informing Ellerth that he could make her job at Burlington "very hard or very easy," depending on whether she submitted to his sexual advances, Slowik conditioned her "easy" employment on her submission to his advances. When she failed to submit, he carried out his threat, making her life "very hard." He made her life very hard by bombarding her with hurtful, offensive, unwanted sexual jokes, comments, innuendoes, and suggestions; by touching her in a sexual manner without her consent; by calling on other Burlington employees to comment on her body; by making sexual comments about

other women to her; and by repeating his demand that she engage in sexual acts as well as sexual conversation with him; finally (4), in making her work at Burlington so "unbearable" that she felt forced to resign, he conditioned her continued employment on her engaging in sexual acts with him.

B. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Rejection Of Slowik's Sexual Demands Was Used As The Basis Of Adverse Employment Decisions Made Against Ellerth.

The EEOC's 1980 Guidelines further define *quid pro quo* sexual harassment as occurring "when submission to or rejection of such conduct by an individual is used as the basis for *employment decisions* affecting such individual (emphasis added)." On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that because Ellerth rejected Slowik's demands, Slowik made the following adverse employment decisions against her: (1) he delayed her promotion to sales representative; (2) he refused to approve a special project she was undertaking for a customer; (3) he subjected her to ongoing on-the-job harassment in the form of hurtful, offensive, unwanted sexual jokes, comments, innuendos, and suggestions; he touched her in a sexual manner without her consent; he called on other Burlington employees to comment on her body; he made sexual comments about other women to her; and he repeated his demand that she engage in sexual acts as well as sexual conversation with him. And ultimately (4), he made her work at Burlington so "unbearable" that she felt forced to resign.

V.

UNDER THE EEOC'S 1990 GUIDANCE ON SEXUAL HARASSMENT ELLERTH HAS PROPERLY SET FORTH THE NECESSARY FACTUAL ALLEGATIONS TO DEFEAT SUMMARY JUDGMENT.

A. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That A Sexually Hostile Work Environment Resulted In Her Constructive Discharge.

In the 1990 EEOC Policy Guidance, the EEOC explained that harassment that begins as hostile work environment harassment might be later transformed into *quid pro quo* harassment. "For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge." Policy Guidance at 328.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Ellerth submitted her resignation because, as she described in her letter of June 21, 1994, "Ted [Slowik] made my life with Burlington unbearable." This claim is strengthened by the fact that Ellerth regarded Slowik's demand that she describe and change her clothing to satisfy his sexual fantasies as the "straw that broke the camel's back." If the jury so concludes, it may properly conclude that Ellerth was constructively discharged by Burlington in violation of Title VII.

B. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Slowik Communicated An Implicit Threat To Adversely Affect Her Job Status If She Didn't Comply With His Sexual Advances.

In the 1990 EEOC Policy Guidance, the EEOC also explained that "a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply." Policy Guidance at 328, 329.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Slowik communicated an implicit threat to adversely affect Ellerth's job status if she refused to comply with his sexual demands, by finding: (1) that Slowik's threat that he could make life at Burlington "very hard or very easy" was a threat to make her life at Burlington very hard unless she submitted to his demands, or (2) that Slowik's refusal to approve the special project unless Ellerth engaged in some form of sexual banter over the phone with Slowik carried with it an implicit threat to prevent her from performing her job functions. Given that both these threats were ultimately carried out, this argument is particularly forceful.

C. Ellerth Has Submitted Substantial Evidence In Support Of The Allegation That Slowik Abused His Authority Over Employment Decisions To Force Her To Endure His Sexual Conduct.

In the 1990 EEOC Policy Guidance, the EEOC further describes *quid pro quo* cases as those in which "the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." Policy Guidance at 328, 329.

On the factual allegations set forth by Ellerth in response to Burlington's motion for summary judgment, a jury would be justified in concluding that Slowik used his position as a vice-president in charge of Ellerth's division to abuse the actual authority given him by Burlington to make hiring, promotion, termination and supervisory decisions to force her to endure his sexual conduct. Once he hired her, Slowik informed Ellerth he could make her life at Burlington "very hard or very easy" depending on her compliance with his sexual demands. This statement was undoubtedly true; Slowik could make Ellerth's life at Burlington very hard or very easy, because Burlington granted him extensive authority over her. When Ellerth declined to meet Slowik's demands, he exerted his managerial authority to grant or deny promotions to delay her promotion because she was not sexually "loose." When she rebutted his attempts to engage her in sexual banter ["tell me what you're wearing"] or to wear shorter skirts, he used the authority granted to him by Burlington; he refused to approve projects she needed to perform her job, leading to her decision to resign.

Petitioner Burlington argues that Slowik's abuse of authority was not Burlington's responsibility because the harassment was outside the scope of his employment and committed for his own benefit. But decisions to delay promotions and reject projects were completely within the scope of Slowik's employment; it was this authority that he abused. See, e.g., *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990) (employer vicariously liable when counselor initiates unauthorized sexual relationship with patient); *Samuels v. Southern Baptist Hospital*, 594 So.2d 571 (La. Ct. App. 1992) (hospital vicariously liable when nursing assistant rapes patient). While Slowik may have been motivated by his own interests, it was also in his employer's interests that he makes decisions about promotions and customer

projects. See Restatement (Second) of Agency, comment to Section 236 (1957) ("the fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment"). In empowering Slowik with the authority to make decisions altering Ellerth's career with Burlington, Burlington assumed responsibility for any employment decisions Slowik made affecting Ellerth, regardless of whether Slowik's decisions were improperly motivated by Ellerth's failure to submit to his inappropriate sexual demands.

CONCLUSION

In the instant case, Kimberly Ellerth was subjected to both threats and retaliation for her refusal to submit to her supervisor's sexual demands, and that retaliation included both economic and non-economic consequences. Therefore, the question presented by the petitioner is completely unrelated to the actual facts of the case, and certiorari was improvidently granted. If this Court determines that the writ of certiorari should not be dismissed, *amicus* has demonstrated that *quid pro quo* harassment under Title VII includes threats by supervisors that are not carried out, and that liability is not limited to cases where the victim only suffers "tangible economic detriment." This is supported by EEOC guidelines and guidance, scientific evidence, Congress's amendment of Title VII in 1991 to include damages for non-economic harm, and the overall purposes of Title VII. Based on these definitions of *quid pro quo* harassment, Ellerth has set forth the necessary factual allegations to defeat summary judgment.

Respectfully submitted,

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